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No. 297

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

J. A. TOBIN CONSTRUCTION COMPANY; ODESSA KREBS; EDMOND H. KREBS, JR.; LORENA LANE, nee Krebs; NAWATHA REDDING, nee Krebs; JAQUITAH BAILEY, nee Krebs; and JOSEPH E. KREBS, Individually; and JOSEPH E. KREBS, As Executor of the Estate of Edmond H. Krebs, Deceased,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

F. PHILIP KIRWAN,
CHARLES W. MEDLEY,
1000 City National Bank Building,
Kansas City, Missouri,
Attorneys for Petitioners.

E. L. MEUSENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

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Petitioners pray that Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled cause on March 5, 1965. Timely Motion for Rehearing denied April 28, 1965.

CITATION TO OPINIONS BELOW

The report and decision of a Commission appointed by the United States District Court for the Eastern District of Oklahoma, in a condemnation proceeding pursuant to Rule 71A(h), F.R.C.P., which was approved and adopted by the District Court is unreported and is printed in Appendix A hereto, *infra*, p. A1.

The opinion of the United States Court of Appeals for the Tenth Circuit, printed in Appendix B hereto, *infra*, p. A19, is reported in 343 F.2d 422.

JURISDICTION

The judgment of the Court of Appeals was entered on March 5, 1965, (Tr. 3), *infra*, p. 5. Timely motion for rehearing was denied on April 28, 1965. (Tr. 5-6) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Have the constitutional rights of petitioner under the "just compensation" clause of the Fifth Amendment been violated by the action of the United States in obtaining title to a tract of land by condemnation, on which was located an admittedly valuable rock quarry, without compensating the fee and leasehold owner of such tract, because the Commission found that the only value of such quarry was to supply rock to contractors who were performing service for the United States?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is that part of Amendment V, Constitution of the United States, which states, ". . . nor shall private property be taken for public use, without just compensation."

STATEMENT

The present action arose out of an eminent domain proceeding filed by the United States at the request of the Secretary of Army. (R. 3) Jurisdiction of the District Court was invoked because the United States was a party.

The taking was in connection with a flood control and related purpose project which established the Eufaula Dam and Reservoir in the State of Oklahoma. The dam constructed under the above project would flood portions of two highways which required that they be relocated. (R. 210)

The petition in condemnation was for the purpose of acquiring a right-of-way to relocate Highway 9-A.

The fee owners of this tract were petitioners, "the Krebs heirs."

Petitioner Tobin Construction Company is a general highway contractor and commercial quarry operator. It had a leasehold interest in the tract being condemned. (R. 20)

In February, 1961, Tobin was awarded a contract by the United States for constructing and relocating Oklahoma State Highway 9. (R. 217) In April, 1961, Tobin leased a tract of land from the Krebs heirs for the pur-

pose of opening a rock quarry, and expended approximately $33,000 in making the site suitable for a quarry. The rock was being used to fulfill Tobin's contractual obligation to build Highway 9, and also for private sales.

In September, 1961, the government filed its Complaint in Condemnation for the purpose of acquiring a right-of-way for relocating Oklahoma State Highway 9-A, including an interchange connection to Highway 9. It was then discovered that the 9-A interchange right-of-way would pass directly through the quarry Tobin had opened a few months earlier.

On October 9, 1961, the United States was granted leave to take immediate possession of the condemned premises and Tobin was required to abandon the rock quarry, and immediately opened another quarry a short distance away at a cost of $27,500. (R. 21, 36, 157)

Pursuant to Rule 71A(h), F.R.C.P., the District Court appointed a Commission to determine the amount of just compensation due petitioners for the property taken. (R. 25)

After a hearing, the Commission found that the land had no market value as a rock quarry except that Government activities in connection with the Eufaula Project had created a demand for rock by private contractors, but that since this demand was created solely by the needs of the United States, the value attaching by reason of such demand could not be considered in determining market value, and there being no market for rock quarries outside of the aforesaid demand for rock, the Commission refused to consider any value due to the location of a rock quarry on the land, therefore, made an award of zero dollars to Tobin Construction Company, *infra*, p. A1. (R. 26-40)

The District Court affirmed and adopted the Commissioners' report over petitioners' objections. (R. 40-43) The Circuit Court of Appeals affirmed, holding that the land had no market value as a commercial quarry aside from the demand created by governmental activities, and that this demand could not be considered. (Tr. 3)

Timely motion for rehearing was filed and overruled. (Tr. 5-6)

Petitioners now pray for a Writ of Certiorari from this Court, alleging violation of the "just compensation" clause of the Fifth Amendment.

REASONS FOR GRANTING WRIT

In the present case the facts as found by the Commission determined that petitioners had valuable property rights taken from them by the United States in an eminent domain proceeding. The Court of Appeals approved the Commission's refusal to compensate the parties for these rights by blindly applying the legal maxim, "that just compensation is wedded to the morals of the market place under which it (the government) is bound to pay only for that which it takes and severance damages for that which remains. It is not bound to pay for that which it injures or even destroys as a consequence of the taking." In the present case the government took a highway right-of-way but destroyed a rock quarry.

The evidence as found by the Commission was that the United States took a highway right-of-way directly through a rock quarry, which had been opened by petitioner Tobin a few months earlier at a cost of $33,000. The petitioner upon the taking was ousted from this location and had to immediately open another quarry a short distance away at an additional cost of $27,500.

They refused to allow compensation for the quarry taken because the Commission found that such quarry had no market value except to supply rock for petitioner's own needs and the needs of other contractors who had contractual obligations to the United States, and such value could not be considered.

Taking into consideration the vast number of eminent domain cases filed by the federal government, and taking into consideration that only a minute percentage of such cases will ever reach this Court, the question here presented involves a question of federal law of vast importance not settled by the Court.

The traditional concept of "just compensation" as defined by the Court is "the full equivalent in money for the property taken. . . . The guiding principle . . . is reimbursement to the owner for the property interest taken. . . ."[1] The Court has also recognized that "just compensation" as used in the Fifth Amendment requires something more than the application of "parroted" legal maxims.[2]

The present deviation from the Court's traditional concept of "just compensation" in a reported Court of Ap-

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1. *Seaboard Airlines Railway Co.* v. *United States,* (1923) 261 U.S. 299, 43 S. Ct. 354.

2. *United States* v. *Toronto, Hamilton, Buffalo Navigation Company,* (1949) 338 U.S. 396, 70 S. Ct. 217, 221:

> "Perhaps no warning has been more repeated than that the determination of value cannot be reduced to inexorable rules. . . ."

United States v. *Cors,* (1949) 337 U.S. 325, 69 S. Ct. 1086, 1090:

> "The court in its construction of the constitutional provision has been careful not to reduce the concept of just compensation to a formula. The political ethics reflected in the Fifth Amendment reject confiscation as a matter of justice."

peals case will be used as a club over the heads of thousands of citizens whose property is being daily taken by eminent domain, and who are not represented by "constitutional" lawyers. Such deviation will no doubt be expanded by other lower federal courts unless the Court strikes down immediately in this case what amounts to an outright confiscation of private property without compensation.

The Court of Appeals decision in this instance takes the doctrine of the Court as announced in *United States* v. *Miller*,[3] and expands its application to a factual situation where the reason for the Miller doctrine is not applicable.

The sound reasoning behind Miller was that the property owner should not be permitted to profit by the fact that his land was being taken by condemnation, and it would be unfair to the government to make it pay an increased value for property which its demand created.

The reasons for this rule are not present in the instant case and to permit its application is simply to reduce the concept of "just compensation" to a formula. It is not profit that petitioners seek, but simply compensation. There is nothing unfair in requiring the government to pay petitioners for that which was taken from them, and which petitioners immediately replaced at an admitted cost of $27,500.00.

Petitioners respectfully submit that their right to "just compensation" under the Fifth Amendment has been

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3. *United States* v. *Miller*, (1943) 317 U.S. 369, 63 S. Ct. 276, held that increased value resulting from the public improvement project cannot be considered in an eminent domain proceeding.

violated and the
be granted.

heir petition for a writ of certiorari should

Respectfully submitted,

F. PHILIP KIRWAN,
CHARLES W. MEDLEY,
1000 City National Bank Building,
Kansas City, Missouri 64106,
Attorneys for Petitioners.

APPENDIX A

Report and Decision of Commission Appointed by the United States District Court for the Eastern District of Oklahoma

Trial opened on Friday, September 13, 1963, at 9:15 o'clock A.M. in the Federal Building at Muskogee, Oklahoma. The claimant, J. A. Tobin Construction Company of 3701 Rainbow Boulevard, Kansas City, Missouri, appeared by its President, Joseph A. Tobin, and by its attorney, F. Philip Kirwan of 1300 City National Bank Building, Kansas City, Missouri. All the members of the Krebs family appeared by Joseph E. Krebs, one of the owners and a member of the family, and by Charles B. Tucker, their attorney, of McAlester, Oklahoma. The United States of America appeared by James J. Conrad, Special Assistant United States Attorney. The attorneys for the parties made opening statement summarizing the respective positions and claims of the parties. The Krebs family claims damage to their farm home as a result of the taking and the J. A. Tobin Construction Company claims damage to a stone or rock quarry which it had opened on the Krebs land. We will first proceed with a summary of the trial as to J. A. Tobin Construction Company.

The date of taking is September 20, 1961.

101] It appeared from the opening statement of counsel that early in 1961 J. A. Tobin Construction Company sent a crew of workmen into the vicinity of the lands involved to explore for deposits of rock suitable for use in construction work on the Eufaula Dam and Reservoir Project and also for commercial sales in the vicinity.

This crew of workmen carried on core drilling operations and located on the Krebs farm a rock deposit which the company concluded was usable. Negotiations were opened for a lease on the farm involved for rock quarry purposes and a lease was later obtained and the quarry was in fact opened. At sometime in the year it was discovered that the quarry was almost in the middle of an area which the government proposed to take for the relocation of Oklahoma State Highway 9-A and an interchange at the connection of such highway with Oklahoma State Highway 9. The government did condemn the area for highway purposes and this, of course, resulted in the closing of the quarry. The question involved is the extent of damages, if any, which J. A. Tobin Construction Company is entitled to have by reason thereof. The J. A. Tobin Construction Company claims that the quarry in question had been well-known to be an established quarry for many years and that it had a value as a commercial quarry at the time of the taking. Tobin claims that this value as a commercial quarry was entirely separate and apart from the demand for rock created by the Eufaula Dam and Reservoir Project, and that it had existed for many years before the project began and existed at the time of the taking. The government claims that the quarry thus opened by Tobin had never been a commercial quarry over the years, that there was no demand for rock in the vicinity at the time of the taking other than for the Eufaula Dam and Reservoir Project and hence, that the quarry had no market value at the time of taking.

102] Joseph E. Krebs, one of the land owners, testified that he had lived on the land at intervals from time to time over many years and that about 1938 large quantities of rock were taken from the area for use in a W.P.A. project at the City of Eufaula, Oklahoma, in which curbs and gutters were constructed in a large section on the

west side of the City of Eufaula. He further testified that in 1943 the Missouri, Kansas & Texas Railroad took large quantities of rock from the area involved for use in riprapping its right of way near its bridge over the Canadian River, and that about the same time Oklahoma Highway Commission also took rock from the area for use in riprapping the highway near the Canadian crossing. This 1943 use followed the well-known 1943 flood on the Canadian River. Charles R. Woods of Eufaula testified that he had resided in Eufaula since 1916 and that he was the project supervisor on the W.P.A. project in Eufaula in 1938 and 1939 that is above referred to. He testified that between 4,000 and 5,000 cubic yards of stone were taken from the area for use in the W.P.A. project and that from 30 to 40 men were employed in taking out the stone and that stone was taken from an area of from 6 to 8 and possibly 10 acres. The witness, F. P. Catterton testified that he had known the land all his life (he appeared to be about 65 years old), that he had been a tenant on the land for many years, and he confirmed the testimony of Mr. Krebs and Mr. Woods that rock had been taken from the farm for the W.P.A. project in 1938 and for the riprap work on the railroad and highway in 1943. Mr. Krebs also testified that over the years his
103] family had permitted various persons in the vicinity who needed rock for various purposes to take rock from the area involved and that in each instance rock had been charged for at 25¢ per cubic yard. In the opinion of your Commissioners the nature of the use of the area over the years has been made quite clear by the testimony; there is no conflict in the testimony about such use. There was no evidence that machinery had ever been used to open a pit or to produce from the solid rock in the area. There was no evidence that any person remained constantly or even occasionally in charge of the

quarry or that anyone ever attempted to make a sale of rock therefrom. There was no evidence that any rock had been crushed or otherwise processed at or from the area involved until the Tobin Company installed its equipment. Other than the use for the W.P.A. project in 1938 and 1939 (which project continued for perhaps a year) and the additional use in connection with the emergency created by the heavy floods in 1943, there was no substantial use of rock from the area until the Tobin quarry was installed. The Tobin Company's evidence was designed to prove that the area involved had been an established commercial rock quarry for many years before it was leased to Tobin. Your Commissioners are of the opinion that this point has not been established by the proof. They are of the opinion that the area involved was over the years known to be an area in which much loose rock was available close to the surface of the ground and in which rock that was not loose could be easily obtained by the use of pry bars and other like tools, and that people in the vicinity who needed rock would go to the area and obtain permission for a consideration to take rock therefrom which they produced and moved themselves. There is no evidence of any kind that the land owner or any lessee of the land owner (until the Tobin Company's lease) took any part in the removal or preparation of the rock for the market or made any effort to produce and sell it. Your Commissioners, therefore, conclude that the area involved was not a rock quarry in the ordinary sense of the word until the Tobin Company opened such a quarry there.

104] R. E. Saathoff of Omaha, Nebraska, an employee of J. A. Tobin Construction Company, testified that he had 40 years of experience in construction and quarry work and had helped to locate about 100 quarries throughout the United States. He testified that in January, 1961,

a Tobin crew came into the vicinity of the land and drilled about 50 test holes within two or three miles of the lands involved seeking commercial rock; that laboratory samples of the rock were sent to Kansas City and were approved and that it was established that a source of rock was available within the area involved in the condemnation at least 500 feet long and 300 feet wide with an upper vein of brown sandstone about 6 feet thick and a lower deposit of blue sandstone about 25 feet thick. He testified that 8 core holes were drilled on the Krebs property here involved. Substantially the same testimony about the drilling and discovery was given by Courts R. Carter, an engineer and employee of the Tobin Company. Mr. Carter testified also that he supplied samples from the quarry to the Corps of Engineers, and that samples were tested both by the Tobin Company and by the Corps of Engineers and were found acceptable for a contract to relocate Oklahoma State Highway 9 which had been awarded to J. A. Tobin Construction Company. There was testimony by employees of the Tobin Company that the upper layer of rock discovered in the quarry was acceptable for use in riprap and backfill work on the contract which Tobin had obtained, and also that the lower rock discovered, which was referred to as blue sandstone and bluejacket sandstone, was acceptable as concrete aggregate but could also be used for riprap and backfill. Your Commissioners conclude that it was adequately established by the proof that the stone discovered and available in the quarry was generally acceptable for construction work of the kind ordinarily carried on by Oklahoma Highway Commission and by other contractors in the vicinity. Your Commissioners have no doubt from the evidence that the J. A. Tobin Construction Company did locate and open a quarry in which good stone was available.

105] In any event, it is apparent beyond all question from the evidence that J. A. Tobin Construction Company did begin searching for a quarry about January, 1961, that it did locate a quarry site containing good stone, and that it began the work of clearing the overburden from above the stone and of moving in its machinery to the quarry site late in April, 1961. Meanwhile, the government had advertised for bids on the relocation of Highway 9 in January, 1961, the bids had been opened in February, 1961, and the contract had been awarded to J. A. Tobin Construction Company on February 15, 1961; this was Contract H-16-A.

106] A lot of testimony was introduced by both sides about when the Tobin Company discovered, or should have discovered, that its rock quarry was within the area to be taken for Oklahoma State Highway 9-A and the interchange. There is not, in our opinion, any substantial conflict in the evidence about this and we shall, therefore, summarize it without reference to specific witnesses.

It was well-established by the government that the relocation of Highway 9-A was a part of the over-all Eufaula plan as far back as 1949. Even when the engineers were preparing separate sets of plans involving one dam and two dams on the Canadian River the necessity of the relocation of Highway 9-A was recognized in the one-dam plan. As the years passed these plans were developed in more detail and in October, 1960, the center line of relocated Highway 9-A was staked and flagged for a plan-in-hand survey. It was explained that when this is done the center line of the proposed road is surveyed and substantial stakes are driven at intervals of 100 feet and that flags (strips of colored plastic tissue) are put on the stakes or near the stakes so that the stakes can be easily

seen by a group walking out the line of right of way. The evidence showed that in October, 1960, a party that included representatives of the Corps of Engineers, the Oklahoma Highway Commission and the Bureau of Public Roads took the available plans for the relocation of Highway 9-A and walked out and along the proposed right of way, including the area involved. It was further proved that in addition to the center line stakes that in areas like the one here involved other stakes were driven into the ground and flagged to show points of intersection and other relevant data.

107] However, the detailed engineering plans for the proposed relocation of Highway 9-A were not available to the public or to the Tobin Company until bids were sought for that part of the project.

Nevertheless, the blueprints from which the J. A. Tobin Construction Company prepared its bid for the contract that it obtained for Highway 9 showed clearly by the dotted line that the over-all plan included a relocation of Highway 9-A with an interchange that would connect to Highway 9 at the Northeast Corner of the Southwest Quarter of Section Nineteen, almost exactly at the location of the quarry opened by Tobin. If Tobin's men who established the quarry did not see the stakes and flags from the plan-in-hand survey, it is difficult for your Commissioners to understand how the company could have overlooked the clear indication from the blueprints for relocation of Highway 9 that there would be a conflict between the quarry location and the Highway 9-A interchange as soon as construction began. One of the witnesses for the government testified that when the government first discovered that the quarry was being located in the proposed right of way and he went to the site to call this to the attention of the Tobin Company foreman, that one of the stakes from the plan-in-hand

survey was still in place and that he pointed this out to Tobin's men. In any event, the government learned in April that the quarry was being located in the proposed right of way for Highway 9-A, and thereafter various conferences were had between representatives of the Corps of Engineers and representatives of the J. A. Tobin Construction Company about what should be done on account of this. Testimony further shows that the Tobin Company shut the quarry down for a short time and executives from its main office in Kansas City came to the Eufaula area to study the problem and these, too, conferred with representatives of the Corps of Engineers about it. At this time the Corps of Engineers had not instituted condemnation proceedings on the lands involved. The Corps of Engineers did not forbid the J. A. Tobin Construction Company from proceeding with work in the quarry, and after a brief shutdown to study the problem the company proceeded with its work. It is reasonably clear from the evidence, and we think beyond dispute, that at the time in April, 1961, when a representative of the Corps of Engineers visited the quarry site and informed the Tobin Company that the site was within the area of relocated Highway 9-A that the only development work which Tobin had then done consisted of clearing the quarry site with bulldozers looking toward further operations.

108] The Commissioners are inclined to the opinion that the J. A. Tobin Construction Company should have noted in the blueprints which were made available to it for its bidding that a new highway would be put where its quarry was being opened. However, it is the further opinion of your Commissioners that whether the Tobin Company knew, or should have known, that its quarry was in the way of the road is of no consequence for the decision of your Commissioners in this case. The testimony

involved is perhaps relevant as rebuttal testimony to the claim of the Tobin Company that it came to Oklahoma with the intention of locating a permanent commercial quarry. It seems doubtful to your Commissioners that a company intending to locate a permanent quarry in a new state would not inquire more closely about the probabilities of development in the area, and particularly about the possible relocation of the highways which it used while looking for the quarry. As noted above, however, your Commissioners are of the opinion that a final and definite conclusion on this point by them is not necessary for their decision in this case.

109] We think it was conclusively proved by testimony that is not seriously disputed that after the discussions between the executives from the Tobin Company and the representatives of the Corps of Engineers early in May, 1961, the Tobin Company proceeded without further delay to open the quarry and the government proceeded with dispatch to institute condemnation proceedings and take the area involved as quickly as possible. A reason for this developed in the testimony of the government was that the contractor who would relocate Highway 9-A would be required to fill the hole created by the Tobin quarry. Also, blueprints and specifications issued by the government on its invitation to bids on Highway 9-A were not correct because the profile in the vicinity of the quarry was being changed by the work done by Tobin. It was necessary that the government issue an amendment to the invitation to bids because of this. Further, the government feared that the quarry operations would be in the way of performance by the contractor. In any event, the government filed a condemnation suit. The declaration of taking was effective September 20, 1961. The Tobin Company nevertheless continued to operate the quarry for some time thereafter

and it was necessary that the government bring the company before the United States District Court for the Eastern District of Oklahoma to obtain an order for possession. This order was made on October 9, 1961. It is not clear to your Commissioners from the evidence just exactly when the Tobin Company quit shooting rock in the Krebs quarry, but to say the least, sometime in the Fall of 1961 its operation in the Krebs quarry became limited to the use of a crusher and other equipment to process rock that had already been excavated. This continued after October 9, 1961, and over the protest of the Corps of Engineers until Bowen Construction Company, the successful bidder for the contract for the relocation of Highway 9-A, gave the Corps of Engineers a letter of assurance on December 26, 1961, that it was agreeable with Bowen to allow Tobin to continue operations and that no effort would be made by Bowen to charge any expense or damage arising from the operations of Tobin to the government.

110] Meanwhile, the J. A. Tobin Construction Company began to explore for a new quarry on the adjoining land to the East (not involved in this case) and developed there a quarry which was known as the Richardson quarry (as distinguished from the Krebs quarry which is involved here). For several months after the date of taking the rock crusher was maintained in place on the Krebs quarry and was used there to process rock which had been shot from the Krebs quarry before the order for possession, and also to process rock brought across the line from the Richardson quarry to the East. Apparently, the Corps of Engineers ceased to be concerned about the problem after receiving the letter of assurance from Bowen Construction Company dated December 26, 1961, and sometime thereafter the quarrying operations on the Krebs quarry ceased and the contract

of J. A. Tobin Construction Company was completed with rock quarried from the Richardson quarry to the East.

111] The J. A. Tobin Construction Company claims that in the Krebs quarry it had developed an already existing recognized commercial quarry into a well-established commercial quarry that had an available market in the vicinity other than the needs of the government incidental to the Eufaula Project, and that it is entitled to be paid the fair cash market value of this permanent quarry. It had undertaken to prove the pre-existence of the quarry by the witnesses Krebs, Woods and Catterton. It then brought before your Commissioners the witness Charles Pate. Mr. Pate was produced as an expert witness. He had obtained the degree of Bachelor of Science in Civil Engineering from the University of Missouri in 1922. At the time of the hearing he had been licensed in Oklahoma, Kansas, Texas, and Missouri as a Civil Engineer. He had worked as a Civil Engineer for the Missouri Pacific Railroad from 1922 until 1932. From 1932 until 1944 he had worked for the Corps of Engineers of the United States Army. It is interesting to note that several years of his work with the Corps of Engineers was on the Missouri River and that in such work he had located and opened 11 quarries. This work had been done by him for the Corps of Engineers. Later he had gone into private business operating his own engineering company and had done extensive work in Oklahoma. He had first seen the Krebs quarry here involved on November 29, 1961.

112] Mr. Pate testified as an expert witness to prove the fair cash market value of the Krebs quarry. We suppose that no comparable sale of a quarry was available as proof, for none was offered in evidence. Instead, Mr. Pate projected and estimated by explaining that the

State Highway Commission of Oklahoma has a definite number of millions of dollars available for highway work each year, that by law not less than 8% of this amount must be spent in each of the 8 highway districts in the State, that as a practical matter it could be expected that at least 12% of the annual appropriation will be spent in the Eufaula District No. 3 each year, and he also analyzed previous highway lettings to show the percentages of the appropriation that would be normally spent for rock and stone and for work and contracts that would require rock of the kind available from the Krebs quarry. He concluded that with this prospect of substantial amounts of money being available each year for highway construction in the State and in District 3 that there was bound to be a market for stone of the kind produced at the Krebs quarry. He listed and located the nearest competing quarries such as the Youngman Quarry a few miles North of Eufaula, the Sallisaw Quarry at Sallisaw in Sequoyah County, Oklahoma, the Stringtown Quarry in Atoka County, Oklahoma, and he concluded that there was no competing quarry close enough to the Krebs quarry to underbid the Krebs quarry for work which he felt certain would be available in its vicinity. He also mentioned that rock was needed for ready-mix concrete plants at Eufaula and McAlester, that there was a limited market for rock needed for the construction of homes and for driveways and street work in towns. He discussed the distances for which it was practical to haul stone, and it
113] was the opinion of your Commissioners, perhaps from inferences drawn from his testimony rather than from direct statements, that he thought 25 miles was as far as stone from a quarry could be ordinarily hauled without a loss. Mr. Pate estimated the quantities of stone that remained in the quarry at the time of taking; he estimated that it could be sold for amounts not less than

$1.00 per ton and possibly as much as $1.25 per ton at quarry site. This witness stated into the record his computations about how much rock was available for sale and about the cost of producing it. Specifically, he stated that 282,212 tons of rock remained in the quarry at the time of taking and that this could be quarried, removed and marketed for $209,119.00, leaving an excess over production costs of $73,093.00. Out of this $73,093.00 he stated there would have to be paid $10,441.00 in royalty to the land owners. The witness then mentioned the necessity of amortizing $27,187.00 of the original cost of opening the quarry. Your Commissioners cannot see that this has much to do with the market value of an opened quarry that is up for sale. In any event, the witness projected that if the quarry was operated until it was exhausted that it would pay the operator $62,652.00 after payment of royalties and before amortization of opening cost. Your Commissioners have searched their notes carefully and they cannot find in their notes any memorandum that the witness concluded with an estimate or statement or opinion about the fair cash market value of the quarry at the time of taking. Your Commissioners cannot remember that this expert witness gave any such opinion. There was a witness named Vandersall who did undertake to give the fair cash market value of the quarry, but he was an agricultural appraiser and a real estate agent in the small town of Canadian, Oklahoma, without any experience whatsoever in evaluating a quarry, and your Commissioners gave no weight whatsoever to his testimony about the value of this particular quarry. If the witness Charles Pate finally put a value on this quarry as of the date of taking, then all of your Commissioners failed to hear it and note it. If he did so, it will be at the end of his direct examination and possibly again at the end of his cross-examination, but your Commissioners are of the

opinion that he did not reach or state a final conclusion about fair cash market value.

114] The very essence of the Tobin Company's case about the value of the quarry was the testimony of the expert Civil Engineer, Charles Pate. Your Commissioners consider that the matters involved in his testimony were highly speculative, and that the Tobin Company failed to prove that there was a market for stone in the area other than the market arising from the Eufaula Project. Your Commissioners have, therefore, concluded that the quarry had no fair cash market value as of the date of taking.

Your Commissioners are not unmindful of the fact that the J. A. Tobin Construction Company very probably sustained a loss by reason of the taking of the quarry. It was proved to the satisfaction of your Commissioners that the quarry later opened on the adjoining land to the East, known as the Richardson quarry, was not as good as the Krebs quarry, and that the production costs at the Richardson quarry were higher than at the Krebs quarry. At the request of the Commissioners, the J. A. Tobin Construction Company submitted as its Exhibit No. 48 an estimate of the excess costs incident to producing from the Richardson quarry that the company would not have 115] had to pay had the Krebs quarry not been closed down. According to the witness Mr. Lacy (in charge of books and records for J. A. Tobin Construction Company), the cost of production per cubic yard at the Krebs quarry was 70.1¢ and the cost of production per cubic yard at the Richardson quarry was 158.5¢. Undoubtedly the Tobin Company sustained a financial loss by having to close the Krebs quarry and complete its contract from the Richardson quarry, and an easy measure of this loss is to multiply the number of tons that it had to produce from the Richardson quarry by the dif-

ference in the production costs listed above and to add whatever it cost to open the Richardson quarry. However, your Commissioners are of the opinion that this loss is a matter of damages which your Commissioners do not have authority to consider in a condemnation case. They permitted and even requested that evidence on the point be put into the record in order that the entire picture involved may be clearly presented, but it is their opinion that the amount which they can award for this quarry is its fair cash market value at the time of taking, sold by a willing seller who is under no compulsion to sell to a like buyer who is not under any compulsion to buy. In their opinion there is no market for a commercial quarry in the vicinity involved other than to sell stone needed in the Eufaula Dam and Reservoir Project and in the relocation of roads and other work incidental thereto and that are part thereof. Nor have your Commissioners overlooked the testimony that production costs in the Krebs quarry was becoming lower as the development of the quarry proceeded. They are simply of the opinion that there was no market for an ordinary commercial quarry in the area involved at the time of taking other than for work on the Eufaula Project.

116] Therefore, your Commissioners have concluded that J. A. Tobin Construction Company should be paid nothing in this case.

In reaching this conclusion we are not unmindful of the voluminous testimony from both sides about when the Tobin Company first learned that its quarry was in the proposed road, about the several discussions between Tobin's employees and even Tobin's executives and representatives of the Corps of Engineers, the suggestion by Mr. Tobin that the engineers give him a writing telling him what to do about the quarry and their failure to do so. We have reached the conclusion above stated on the

theory that the Tobin Company had the absolute right to operate the Krebs quarry until the date of taking, September 20, 1961, and that until then the government and the Corps of Engineers had no authority whatsoever to forbid him, and that any discussions which occurred before the date of taking were merely advisory and should not affect our decision in this case in any way. In our opinion Mr. Tobin took a calculated risk and lost. In doing so he perhaps used bad judgment. If the Corps of Engineers had delayed the matter of letting the contract for Highway 9-A his risk may have been well-taken. However, we think that none of this should affect our decision one way or another and that our duty is limited strictly to determining the fair cash market value of the quarry, as a commercial quarry, and without regard to the needs of the government in this project as of the date of taking. This we have done.

117] With reference to the damage to the farm owned by the members of the Krebs family, your Commissioners have considered carefully the testimony of L. G. Vandersall of Canadian, Oklahoma, offered by the land owners. Mr. Vandersall gave a background of having been in the real estate and insurance business, having operated farms and a gin. He concluded that the 19.66 acres being taken (except the area covered by the quarry) was worth $150.00 per acre. He thought that before the announcement of the Eufaula Project the entire 254 acres involved was worth $45,635.00, and that after the taking of such area it was worth $34,715.00, and he estimated the damages (exclusive of the quarry) at $10,920.00, which would be about $400.00 per acre for the land being taken, exclusive of the quarry.

We also considered the testimony of William E. Farrell, Staff Appraiser for the Corps of Engineers who fixed

the damages at $700.00. Mr. Farrell related his several trips to the farm; he summarized his report about the kinds of lands involved and their values; he noted that about 10 acres of woodland pasture was severed from the remainder of the farm by the relocation of Highway 9-A, but he thought that this 10 acres was by reason of the location of such highway better available as cabin sites on the edge of the lake and that there was an enhancement in value. He thought that agricultural use was the best use for the property involved; that the full value of the farm before taking was $16,625.00; that full value after taking was $15,950.00; that no severance damage occurred and that actual damage was $700.00. He did not take the quarry into consideration one way or the other. He testified that on the occasion of his inspection on April 19, 1961, that a new house had been begun on the property, but that it was in the early stages of construction and that he did not consider it in making his evaluation and assessment of damages. He saw no evidence that a rock quarry was being located on the farm on that date.

118] Your Commissioners have inspected the lands. Your Commissioners are of the opinion that the damages as assessed by Vandersall are highly exaggerated and that the damages as assessed by the Staff Appraiser for the Corps of Engineers are too low. Your Commissioners have also considered the testimony of the land owner, Joseph Krebs.

It is our conclusion that the area being taken for Tracts K-1147E-3, K-1147E-4 and K-1147E-5 (being 22.22 acres of permanent easement) is worth $60.00 per acre and that $1,333.20 should be paid therefor. It is our conclusion that $30.00 per acre, or $103.20 should be paid for the 3.44 acres of temporary easements involved in K1147E-6, K-1147E-7 and K-1147E-8. We are not convinced that there has been an enhancement in value by the severance

of approximately 10 acres of the farm that now lies adjacent to the lake and northwest of the newly relocated road. This severed area of approximately 10 acres is in our opinion so ruined by the construction work carried on in the vicinity that there is no enhancement in value. Opposite part of such 10 acres the new Highway 9-A goes through a deep cut with ledges of rock in the walls of the cut; opposite the remainder of the 10 acres the highway is on a fill. We think that while it is highly probable that the land owner may be able to develop this 10 acres or to sell it at a considerable profit several years hence, we doubt that there was enhancement as of the date of taking. We, therefore, think that severance damage to the farm as a whole should be awarded and this damage should, in our opinion, be $750.00.

119] With reference to the minerals, we award $7.50 per acre for 25.66 acres and we apportion one-third of this ($64.15) to the mineral lessee and the other two-thirds ($128.30) to the mineral lessor.

Therefore, our total award to the Krebs interest (the members of the Krebs family herein referred to as land owner or land owners) is $2,314.70, and we leave the precise apportionment according to their interests to be prepared by the attorneys in the case. This leaves $64.15 for the oil and gas lessee.

Respectfully submitted,

Geo. W. Moncrief, Jr.,
Commissioner
Alpheus Varner
Commissioner
W. S. Warner
Commissioner

Filed Oct. 1, 1963.

APPENDIX B

United States Court of Appeals

TENTH CIRCUIT

JANUARY TERM, 1965

Filed Mar. 5, 1965

No. 7610

J. A. TOBIN CONSTRUCTION COMPANY, et al,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

This is an appeal from a judgment of the District Court affirming the action and report of a Commission appointed in a condemnation proceedings pursuant to Rule 71A(h), F.R.C.P., to determine just compensation for property taken for a public project. The appellants are

owners of the land and the lessee-operator of a rock quarry under a lease from the landowners.

After a full hearing, the Commission found that the land had no market value as a rock quarry aside from the demand created by the public project and that the quarry did not, therefore, compensably enhance the value of the property taken. Therein lies the crux of this lawsuit; for no complaint is made of the valuation of the land taken without the quarry.

The Commission and the trial court were apparently of the view that this case comes squarely within the general rule under which values in a market created solely by the need of the taker for the property taken are not fair market values to measure constitutionally guaranteed just compensation. See: United States v. Cors, 337 U.S. 325; United States v. Miller, et al., 317 U.S. 369; United States v. 158 Acres of Land, 298 F.2d 559; United States v. Rayno, 136 F.2d 376 and Cameron Development Co., Inc. v. United States, 145 F.2d 290. Thus, "where the government lays out a project involving the taking of lands, no increment of value arising by virtue of the fact that a particular tract is clearly or probably within the project may be added. * * * Any increase in value due to that fact would reflect speculation as to what the Government could be compelled to pay and hence in fairness should be excluded from the determination of what compensation would be just." United States v. Cors, supra, citing Miller v. United States, supra. But, it is not quite accurate to say that property cannot acquire a constitutionally compensable value attributable in whole or in part to a public improvement. If the property was not originally included within the probable scope of the project, but the project is subsequently enlarged to include it, the Government must, of course, pay for the enhanced

value which is due to the original project. See United States v. Miller, supra. So too, if land is taken outside the scope of the project to be used in connection with it, the prevailing market price at the time of the taking is the measure of just compensation. See: Harwell v. United States, 316 F.2d 791.

Appellants seem not to dispute the generally applicable decisional rule for determination of just compensation in cases of this kind. They do earnestly insist, however, that the Government took an established commercial rock quarry quite apart from the Government's demand for its product, and it is, therefore, constitutionally obligated to pay just compensation, even though it was within the scope of the public project. And, if the Government did take land underlaid with rock having a market value apart from the needs of the project, it is, of course, constitutionally bound to pay for it. This is true whether the lands lie within or without the scope of the project.

The basic facts bearing on this issue do not seem to be materially in dispute. They reflect that since 1939 this tract has been known as a source of rock suitable for construction purposes. In 1939, rock was taken from this area for public use in the nearby city of Eufaula. In 1943, rock was taken by a railroad company apparently to reinforce a river embankment. There was also testimony to the effect that at various times over the years rock had been sold to individual buyers for personal use. But, no machinery had ever been installed, and sales were at most sporadic.

Early in January, 1961, Tobin learned that the Government was to request bids on the relocation and construction of Oklahoma State Highway 9 as a part of the Eufaula Dam and Reservoir Project. Tobin determined

availability of suitable rock for the relocation project, and bid for a contract on the basis of its availability. It was awarded the contract about the middle of February and in April entered into a lease with the Krebs family for a period of two years, renewable for two years, without rental but providing for a per cubic yard royalty for the material removed.

Tobin commenced clearing the overburden and moving in machinery preparatory to opening the quarry. About this time, in April, the Government learned that the quarry was being located in the projected right-of-way for an interchange between relocated Highways 9 and 9-A, and representatives of the Corps of Engineers conferred with Tobin about the matter.

It seems that from the very beginning the Eufaula project contemplated relocation of both Highways 9 and 9-A with an interchange between the two, and in October of 1960, the center line of the relocated Highway 9-A was "staked and flagged for a plan-in-hand survey". The center line was surveyed and substantial stakes were driven at intervals of 100 feet and flagged so the stakes could easily be seen by anyone walking out the line of the right-of-way. Although the detailed engineering plans were not available to the public or to Tobin until bids were advertised for the 9-A project with the interchange, the blueprints from which Tobin prepared its bid for the relocation of Highway 9 showed by dotted lines that the overall plan included a relocation of 9-A with an interchange "almost exactly at the location of the quarry opened by Tobin".

When, in April, the Corps conferred with Tobin about the quarry, it was apparently concerned lest the excavations leave a hole in the right-of-way which the contractor on the interchange would be required to fill at

additional cost to the Government. As a result of these conferences, Tobin temporarily ceased his preliminary operations but, since no proceedings had been commenced for the taking of the property for the right-of-way, apparently proceeded to open and operate the quarry for the performance of its contract. Based on these facts, the Commission found that from the very beginning, and certainly from the date of the conferences with the Corps in April, Tobin knew or should have known of the projected plans for the relocation of Highway 9-A and that the quarry was located in the surveyed right-of-way for the interchange.

These proceedings for the acquisition of the right-of-way for the relocation of 9-A and the interchange were commenced in September, and the Government finally took possession by court order in October. Meanwhile, *i.e.*, from April to October, Tobin continued to operate the quarry without interference from the Government, and the Commission specifically found that Tobin was rightfully on the land under its lease and that its quarry operations during that period were not in conflict with the Government's asserted interest. The evidence shows that during this period of time Tobin quarried 50,093 cubic yards of rock, 37,000 cubic yards of which was used on the relocation project, and the remainder was sold for use in a nearby town.

In support of its contention that the tract was used and useful as a commercial quarry when it leased the land Tobin offered evidence tending to show the potential market for the rock aside from the needs of the project. But, there was also substantial evidence from which the Commission specifically found that "there was no market for an ordinary commercial quarry in the area involved at the time of taking other than for use on the

Eufaula project". It concluded, therefore, that the land had no fair market value as a quarry as of the critical date of taking. The findings and conclusions, are substantially supported by the evidence, are not clearly erroneous and are binding here. See: Stipe v. United States, 337 F.2d 818. We agree with the Commission that Tobin established the rock quarry for the purpose of obtaining a source of materials for the performance of his Government contract, and until Topin leased the land, there was no commercial quarry thereon and the land had no market value as a commercial quarry aside from the Government's demand.

Tobin says, apparently in the alternative, that even though the quarry had no fair market value apart from the needs of the project, the Government has nevertheless taken a thriving, profitable business which was then being operated for the convenience and economy of the Government, and that it would be "absurd" even "downright immoral" not to require it to pay just compensation. The evidence shows without dispute that Tobin erected its crusher on its lease at a cost of $33,298.00 and that he was forced to abandon the quarry and open another at an additional cost of $27,755.00. Indeed the Commission found that it sustained a loss by reason of the taking of the land, but was of the opinion that the loss was a matter of consequential damages which they had no authority to consider in a condemnation case. And, we agree.

It is true, as Tobin suggests, that "just compensation" is not wedded to market value or any other method or formula. See: United States v. Cors, supra; Harwell v. United States, supra; United States v. Merz, 376 U.S. 192; Sill Corporation v. United States, (10CA) ..... F.2d .....
But, "just compensation" is wedded to the morals of the market place under which it is bound to pay only for that

which it takes and severance damages for that which remains. It is not bound to pay for that which it injures or even destroys as a consequence of the taking. In short, it is not bound to pay "consequential damages". See: Stipe v. United States, supra, and cases cited.

The decisive fact is that the Government did not take Tobin's business, it took only the land on which the business was situated and which, as we have seen, has no constitutionally compensable value as a commercial quarry. It follows that whatever loss Tobin sustained due to the frustration or destruction of his business did not amount to a taking of his property and was, therefore, not compensable. See: Stipe v. United States, supra.

We think the Commission correctly stated the case when it said that in moving upon the lands and erecting a quarry Tobin took a calculated risk that it would be able to quarry the rock and complete its contract before the land was taken and that it lost.

Finally, the appellants complain of the failure of the Court to follow the suggestions of United States v. Merz, supra, in its instructions and directions to the Commission concerning applicable law and the procedure for the ascertainment of just compensation. Whatever may have been the deficiencies in the Court's directions in its order constituting the Commission, there is no lack of order in the conduct of the hearing or the ascertainment of the facts and their application to the law of the case. The record shows that the Commission conducted a full and complete hearing, made extensive and detailed findings of fact and was fully cognizant of the applicable law to the ascertained facts. We can find no fault with the procedures followed, and the judgment of the Court affirming the findings and conclusions of the Commission is affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 297

J. A. TOBIN CONSTRUCTION COMPANY; ODESSA KREBS; EDMOND H. KREBS, JR., LORENA LANE, NEE KREBS; NAWATHA REDDING, NEE KREBS; JAQUITAH BAILEY, NEE KREBS; and JOSEPH E. KREBS, Individually; and JOSEPH E. KREBS, as Executor of the Estate of Edmond H. Krebs, Deceased, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

As early as 1949, the United States' plans for the Eufaula Dam and Reservoir Project on the Canadian River in Oklahoma called for relocation of highway 9-A (Pet. App. A6). In January 1961, the govern-

ment advertised for bids for construction of the relocated highway (*ibid.*), and, in the same month, petitioner Tobin [1] began seeking a suitable location for a rock quarry for use in that construction (Pet. App. A4). Petitioner's bid was accepted and it was awarded the contract on February 15, 1961 (Pet. App. A6). Despite the fact that the center line and other important points of the projected highway were staked and flagged [2] in October 1960 (Pet. App. A6-A7) and the blueprints supplied to petitioner for the bidding showed the new highway's exact location (Pet. App. A7), petitioner selected and leased [3] a site for its quarry "almost in the middle of an area" designated, by the stakes and on the blueprint, for an interchange between the relocated highway and another road (Pet. App. A2).

Petitioner began clearing the overburden late in April 1961 (Pet. App. A6, A8). At that time as well as later, government representatives personally advised petitioner that its quarry was on land proposed to be taken for the new highway (Pet. App. A8). The government was particularly worried

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[1] Hereafter "petitioner" will be used to refer only to Tobin Construction Company. Any rights of the other petitioners are derivative from Tobin's.

[2] The court below adopted the commission's findings that "substantial stakes were driven at intervals of 100 feet and flagged so the stakes could easily be seen by anyone walking out the line of the right-of-way" (Pet. App. A22, A6-7).

[3] No rental was charged; instead the lease provided for a per-cubic-yard royalty for the material removed (Pet. App. A22).

lest the excavation leave a hole in the right-of-way, not shown on the blueprints upon which the bids were based, which would have to be filled at government expense (Pet. App. A9). After shutting down briefly in April, petitioner continued its operations until the district court ordered it to stop (Pet. App. A8-A10). This condemnation proceeding was filed on September 20, 1961 (Pet. App. A9). Subsequently, petitioner developed a new quarry elsewhere (Pet. App. A10-A11).

In the valuation proceeding, the condemnation commission appointed pursuant to Fed. R. Civ. P. 71A(h) found that the site leased by petitioner was not, as it claimed, a well established commercial quarry and that there was no market for a commercial quarry in the vicinity, apart from the needs of the government for the Eufaula Project. Hence, the commission found that petitioner's interest had no fair market value.[4] It further held that the loss sustained by petitioner in having to readjust its quarry operations was noncompensable consequential damage. Its view was that "Tobin took a calculated risk that it would be able to quarry the rock and complete its contract before the land was taken and * * * it lost" (Pet. App. A25, A16). The district court and the court of appeals affirmed, finding substantial support in the facts and in law for the commission's decision (Pet. App. A19-A25).

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[4] Only the value of the quarry, as such, is in issue here. No complaint is made of the valuation of the land on which the quarry rested.

Further review of this case is not warranted. The fair market value of petitioner's quarry is a question of fact, which was carefully considered below. There is no reason to set aside the concurrent findings of the commission and two courts. *United States* v. *Dickinson*, 331 U.S. 745, 751; *Comstock* v. *Group of Investors*, 335 U.S. 211, 230. The only value in petitioner's quarry arose from the government's special demand for rocks for use in building the highway in whose right-of-way the quarry was dug. "Just compensation" does not require inclusion of such value. In *United States* v. *Miller*, 317 U.S. 369, this Court held that where, as here, the property taken was clearly within the government's project and took on enhanced value from the needs of that project, no account need be taken of that enhancement. This principle was expanded in *United States* v. *Cors*, 337 U.S. 325, where this Court discounted the enhanced value of a vessel, whose taking was not previously contemplated, arising from the demand created by the government's earlier takings of numerous other vessels. Petitioner's contention that the government is compelled, in taking property for a highway, to pay for a quarry dug only because of the construction of that highway, and at a site known to be along its projected route, is untenable. Its acceptance would undermine settled authority, such as the cases cited above, and would foster speculation at public expense.

Nor is petitioner entitled to recover the increased cost of completing the contract with rock from another quarry. "Since 'market value' does not fluctuate with the needs of condemnor or condemnee

but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings." *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377-378; *Mitchell* v. *United States*, 267 U.S. 341, 344-346; *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282-283, 285. In any event, petitioner was fully aware, when it acquired the quarry, that it would be taken for the highway and could have foreseen that this taking would necessitate locating another quarry. It should not now be permitted to shift to the public the relocation cost resulting from its "calculated risk."

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

EDWIN L. WEISL, JR.,
Assistant Attorney General.

S. BILLINGSLEY HILL,
Attorney.

JULY 1965

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No. 297

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

J. A. TOBIN CONSTRUCTION COMPANY; ODESSA KREBS; EDMOND H. KREBS, JR.; LORENA LANE, nee Krebs; NAWATHA REDDING nee Krebs; JAQUITAH BAILEY, nee Krebs; and JOSEPH E. KREBS, Individually; and JOSEPH E. KREBS, As Executor of the Estate of Edmond H. Krebs, Deceased,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF

F. PHILIP KIRWAN
CHARLES W. MEDLEY
1000 City National Bank Building
Kansas City, Missouri,
Attorneys for Petitioners.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

No. 297

IN THE

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OCTOBER TERM, 1965.

J. A. TOBIN CONSTRUCTION COMPANY; ODESSA KREBS; EDMOND H. KREBS, JR.; LORENA LANE, nee Krebs; NAWATHA REDDING nee Krebs; JAQUITAH BAILEY, nee Krebs; and JOSEPH E. KREBS, Individually; and JOSEPH E. KREBS, As Executor of the Estate of Edmond H. Krebs, Deceased,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

The government in its opposition brief has adopted the theory that although the condemnation proceeding was not filed until September 20, 1961, the condemnee was aware that such action would be filed several months previous to such date. That by reason of this knowledge the con-

demnee should be deprived of the improvements he placed on the land at a cost in excess of $33,000.

Petitioner submits that when this argument is exposed to reasoning, one can only conclude that the government is contending that petitioner should be punished for such conduct even at the expense of trampling on its constitutional rights under the "just compensation" clause.

The evidence in the present case does show that petitioner might have had constructive knowledge that the highway right of way would go through the quarry it was opening. The evidence fails to establish that petitioner had actual knowledge of such fact. But whether petitioner did or did not have such knowledge is completely irrelevant to the question of whether it should receive "just compensation" in a condemnation proceeding. If it were conceded that petitioner opened the quarry foolishly, insanely or deliberately, it is still entitled to "just compensation," or "reasonable market value, fairly determined."

Had the petitioner erected a building to house a restaurant to feed government workers, had it erected a warehouse to store its machinery, there probably would be no argument as to the right to be fully compensated. The fact that its expenditure did not build upwards in the form of a building but rather its expenditure was in the form of removing dirt and worthless rock in order to expose and quarry marketable rock, the improvement and increase in value to the real estate was no less, when it is valued as a rock quarry.

Petitioner respectfully submits that the government has now abandoned its attempt to sustain the judgment of the lower court on a constitutional basis, and now asks this court to inflict punishment on the petitioner because

in the opinion of some individual, "Tobin took a calculated risk . . . and . . . it lost."

We trust that a construction of the "just compensation" clause requires a more serious deliberation than this attitude.

Respectfully submitted,

F. PHILIP KIRWAN
CHARLES W. MEDLEY
1000 City National Bank Building
Kansas City, Missouri 64106
Attorneys for Petitioners.

END